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No. 04-980

IN THE SUPREME COURT OF THE UNITED STATES

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTIONS PRESENTED

Under California's capital statutory scheme, in the guilt phase of trial, the sentencer determines whether "special circumstances" exist to make a defendant eligible for the death penalty. In a separate penalty phase, the jury considers and weighs a single list of eleven "open-ended" factors including, as one factor, "the circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true." The factors are not labeled as aggravating or mitigating, but direct the jury's attention to relevant subject matter for the determination of sentence. The jury is required to impose the death penalty only if it is convinced that death is appropriate under all the factors even if aggravation outweighs mitigation.

1. Is the California death penalty statute a "weighing statute" for which the state court is required to determine that the presence of an invalid special circumstance was harmless beyond a reasonable doubt as to the jury's determination of penalty?

2. Was an affirmative answer to the previous question dictated by precedent pursuant to *Teague v. Lane*, 489 U.S. 288 (1989), at the time the conviction in this case was final?

3. If an affirmative answer to the first question was dictated by precedent, was it necessary for the state supreme court to specifically use the phrases "harmless error" or "reasonable doubt" in determining that there was no "reasonable possibility" that the invalid special circumstance affected the jury's sentence selection?

TABLE OF CONTENTS

	Page
OPINION BELOW	1
STATEMENT OF JURISDICTION	1
RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE PETITION	4
I. THE NINTH CIRCUIT'S CONCLUSION THAT CALIFORNIA IS A WEIGHING STATE IS NOT SUPPORTED BY SUPREME COURT AUTHORITY, AND IS CONTRARY TO CALIFORNIA'S VIEW OF ITS OWN STATUTE	4
A. The Ninth Circuit's Holding In Contrary To This Court's Precedent	4
B. The Ninth Circuit's Holding Is Contrary To The California Supreme Court's View Of Its Own State Statute	8
II. THE NINTH CIRCUIT'S DECISION IN *SANDERS* CREATED NEW RULES WHICH CANNOT BE APPLIED RETROACTIVELY	11
III. CALIFORNIA PERFORMS ITS OWN HARMLESS ERROR ANALYSIS TO INVALID SPECIAL CIRCUMSTANCES AND DID SO IN THIS CASE	13
CONCLUSION	14

TABLE OF AUTHORITIES

	Page
Cases	
Bacigalupo v. California 512 U.S. 1253 (1994)	9
Bacigalupo v. California 506 U.S. 802 (1992)	9
Barclay v. Florida 463 U.S. 939 (1983)	7
Beardslee v. Brown ___F.3d ___(2004) (No. 01-99007, filed Dec. 29, 2004)	11
Brecht v. Abrahamson 507 U.S. 619 (1993)	3
Clemons v. Mississippi 494 U.S. 738 (1990)	4, 5, 9, 12
Godinez v. Moran 509 U.S. 389 (1993)	11
Goeke v. Branch 514 U.S. 115 (1995)	11
Hopkins v. Reeves 524 U.S. 88 (1998)	11
Jones v. United States 527 U.S. 373 (1999).	13
Parker v. Dugger 498 U.S. 308 (1991)	5

TABLE OF AUTHORITIES (continued)

	Page
People v. Allen 42 Cal.3d 1222 (1986)	13
People v. Bacigalupo 6 Cal.4th 457 (1993)	6, 7, 9, 10, 12
People v. Bacigalupo 1 Cal.4th 103 (1991)	9
People v. Brown 40 Cal.3d 512 (1985)	7, 8
People v. Frierson 25 Cal.3d 142 (1979)	8
People v. Jones 29 Cal.4th 1229 (2003)	13
People v. Miranda 44 Cal.3d 57 (1987)	6
People v. Sanders 51 Cal.3d 471 (1990)	2
People v. Silva 45 Cal.3d 604 (1988)	13
Sanders v. California 500 U.S. 948 (1991)	3, 10
Schiro v. Farley 510 U.S. 222 (1994)	11
Stringer v. Black 503 U.S. 222 (1992)	4, 5, 7, 9-12

TABLE OF AUTHORITIES (continued)

	Page
Teague v. Lane 489 U.S. 288 (1989)	i, 11
Tuggle v. Netherland 516 U.S. 10 (1995)	7
Tuilaepa v. California 512 U.S. 967 (1994)	5-7, 12
Zant v. Stephens 462 U.S. 862 (1983)	2, 4, 6, 8, 9, 11
Statutes	
California Penal Code § 190.3	2, 8
Court Rules	
U. S. Sup. Ct. Rule 10, subdivision (a) Rule 10, subdivisions (c) and (a)	9 4

IN THE SUPREME COURT OF THE UNITED STATES

No.

JILL L. BROWN, Warden, *Petitioner,*

v.

RONALD L. SANDERS, *Respondent.*

Petitioner Jill L. Brown, Warden of California State Prison at San Quentin, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the Ninth Circuit ordering the grant of habeas corpus relief with respect to the death sentence imposed on respondent is reported at 373 F.3d 1054. (Appendix A.) The opinion of the district court is unpublished. The opinion of the California Supreme Court affirming respondent's death sentence is reported at 51 Cal.3d 471. (Appendix C.)

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on July 8, 2004. A petition for rehearing and rehearing en banc was denied on October 13, 2004. (Appendix B.) This Court's

jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

RELEVANT STATUTORY AND CONSTITUTIONAL PROVISIONS

California's capital sentencing scheme is set out, in relevant part, in California Penal Code section 190.3.

The Eighth Amendment to the Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.

The Fourteenth Amendment to the Constitution provides, in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

In 1981, Sanders and a confederate bludgeoned Janice Allen to death and nearly killed Dale Boender during a robbery, a few days after Sanders had botched a robbery on the same victims. In 1982, Sanders was convicted in Kern County, California, of murder, attempted murder, robbery, burglary, and attempted robbery, crimes he committed in 1981. The jury found that Sanders was eligible for the death penalty by finding four special circumstances true: the burglary special circumstance, the robbery special circumstance, the witness-killing special circumstance, and the especially heinous, atrocious and cruel murder special circumstance. Sanders was sentenced to death.

Sanders' conviction and sentence were affirmed in *People v. Sanders*, 51 Cal.3d 471 (1990). (App. C.) Although the California Supreme Court found the burglary-murder and especially heinous-atrocious-cruel special circumstances invalid, the court, relying on this Court's decision in *Zant v. Stephens*, 462 U.S. 862 (1983), held the jury's consideration of those two invalid special circumstances as one part of the

aggravating and mitigating factors in sentence selection at the penalty phase was "benign" and there was "little chance" Sanders was prejudiced by it. (App. C at 72.) This case became final on May 28, 1991, when this Court denied certiorari on direct appeal. *Sanders v. California*, 500 U.S. 948 (1991).

The United States District Court for the Eastern District of California denied Sanders' petition for a writ of federal habeas corpus on August 24, 2001. (App. A at 8996.) The Ninth Circuit reversed and remanded the case to the district court with instructions to grant the writ as to the penalty phase unless the state granted a new penalty trial or imposed a penalty less than death. (App. A at 9017.)

The Ninth Circuit held: (1) that for purposes of evaluating the effect of an invalid aggravating factor on the penalty selection, California is a "weighing" state because the jury "must consider the defined list of aggravating factors and may not consider other aggravating factors in making its penalty determination"; (2) despite the invalid aggravators in Sanders' case, the California Supreme Court did not engage in a proper harmless error analysis for a weighing state since it did not use the words "harmless error" or "reasonable doubt" because it "erroneously" applied the rule for "non-weighing" states; and (3) the error was substantial and injurious under *Brecht v. Abrahamson*, 507 U.S. 619 (1993).

REASONS FOR GRANTING THE PETITION

I.

THE NINTH CIRCUIT'S CONCLUSION THAT CALIFORNIA IS A WEIGHING STATE IS NOT SUPPORTED BY SUPREME COURT AUTHORITY, AND IS CONTRARY TO CALIFORNIA'S VIEW OF ITS OWN STATUTE

The Ninth Circuit held that California is a "weighing" state and that the California Supreme Court did not sufficiently determine whether the invalidation of two special circumstances was harmless error. Although the Ninth Circuit purports to rely on this Court's decisions in *Zant v. Stephens*, 462 U.S. 862, *Clemons v. Mississippi*, 494 U.S. 738 (1990), and *Stringer v. Black*, 503 U.S. 222 (1992), its opinion in this case is a misapplication of those relevant decisions on the important federal question defining so-called "weighing" and "non-weighing" capital statutes and, in particular, analyzing the effect of invalid aggravating factors under California's death penalty law. Its opinion also conflicts with the California Supreme Court's resolution of this same federal question. U. S. Sup. Ct. Rule 10, subds. (c) and (a).

A. The Ninth Circuit's Holding In Contrary To This Court's Precedent

So far, in determining whether a death penalty remains valid following the striking of one or more aggravating factors, this Court has addressed state capital sentencing schemes which are clearly either "weighing" or "non-weighing." Weighing states use a structured categorical procedure of specifically labeled aggravating and mitigating circumstances. See *Zant*, at

890, and *Parker v. Dugger*, 498 U.S. 308, 318 (1991). [1]

The critical difference between a "weighing" and a "non-weighing" system is that if the sentencer considers an invalid aggravating factor, the state court in a weighing state, at a minimum, must determine "beyond a reasonable doubt" that the invalid factor did not affect the sentencer's verdict, even if there were other valid aggravators. In a non-weighing state, the state court need only assure itself that the invalid factor did not lead to the consideration of any irrelevant or inadmissible factors.

In the penalty phase in a weighing state, such as Mississippi, the jury must find the existence of at least one statutory aggravating factor to make the crime death-eligible, and then weigh that aggravating factor, and only that aggravating factor, against any mitigation to determine which penalty should be selected. *Stringer*, 503 U.S. at 229.

Non-weighing states, such as Georgia, do not use this categorical structure. The jury must find the existence of at least one statutory aggravating factor to make the crime death-eligible, but then the jury is instructed to take all the facts and circumstances of the case and the defendant into consideration in selecting the penalty, with the aggravating factor having no specific role in that process. *Stringer*, at 229-230.

In a weighing state, since the aggravating factor played a key role in sentence selection, an invalid aggravating factor is more significant than in a non-weighing state. A sentence based on an invalid aggravating factor cannot be automatically affirmed even though the sentencer weighed other valid aggravating factors. *Stringer*, at 230-231. A state court may cure the error by either reweighing the valid factors or finding the error harmless beyond a reasonable doubt. *Clemons*, 494

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1. While this Court has previously addressed the California capital statute, this Court has not determined whether California is a weighing or a non-weighing state. (But see *Tuilaepa v. California*, 512 U.S. 967, 981-984 (1994) (Stevens, J. conc.) (analogizing California law to Georgia law in *Zant*.)

U.S. at 750 and 753.

In a non-weighing state, an aggravating factor has no specific role in the selection process, and, therefore, if the evidence underlying the factor is otherwise properly before the jury, an invalid aggravating factor will not nullify the death penalty if the factor did not unduly affect the selection process or make the penalty arbitrary or capricious. *Zant*, 462 U.S. at 890.

California's statute fits neither of the categories of the statutes considered by this Court. During the guilt phase, special circumstances serve the narrowing function constitutionally required for determining death eligibility. *People v. Bacigalupo*, 6 Cal.4th 457, 468 (1993) (*Bacigalupo II*).

However, in the penalty phase, California's statute directs the jury to a "single" or "unitary" list of eleven "open-ended" sentencing factors which point the jury to relevant subject matter. *Tuilaepa*, 512 U.S. at 974-975. The special circumstances are relegated in that phase to being a subpart of one factor ("factor (a)") which includes "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding *and the existence of any special circumstances found to be true* [emphasis added]." Unlike "weighing" states, these factors are not divided into aggravating and mitigating categories. *Bacigalupo* II at 649; see also *Tuilaepa*, at 977, 979-980 . Both the prosecution and the defense may make far-ranging arguments about whether the defendant deserves the death penalty. *Tuilaepa*, at 979. The California factors impart to the jury a "full range of factors" as a "framework for the exercise of its discretion and can assist the jury in placing the particular defendant's conduct in perspective." *People v. Miranda*, 44 Cal.3d 57, 104 (1987). The California factors are similar to Georgia's, where the sentencer considers "all circumstances before it from both the guilt-innocence and the sentence phases of the trial [. . .which] relate to both the offense and the defendant." *Zant*, 462 U.S. at 872.

California law does limit the jury's consideration to the "specific factors listed in the statute," but the statute does not limit the jury's power to apply those factors as it chooses. *People v. Brown*, 40 Cal.3d 512, 544 (1985). California jurors are not restricted to weighing aggravation against mitigation. Rather, California juries may return a death verdict only if they conclude it is appropriate even if the aggravation outweighs the mitigation. *Bacigalupo II*, at 470.

On the other hand, California's single list of factors to be considered during the penalty selection phase effectively diminishes any concern that the mere labeling of facts of the offenses as "special circumstances" would impact the jury's determination in any significant way. *Tuilaepa*, at 974, 978, and 981-984 (Stevens, J., conc.). A California jury was not instructed to give any special weight or greater emphasis to multiple special circumstances. *Zant*, at 888, 890. Accordingly, the invalid labeling of otherwise relevant admissible evidence about the defendant's crime as a "special circumstance" does not add a forbidden thumb to "death's side of the scale." *Stringer*, 503 U.S. at 231.

The Ninth Circuit drew the wrong lesson from this Court's jurisprudence when it defined a weighing state in *Sanders* as one in which the "jury's sentencing discretion is not boundless–it must consider the defined list of aggravating factors, and may not consider other aggravating factors, in making its penalty determination." However, the possibility of an invalid aggravating factor does not necessarily distinguish a weighing from a non-weighing state. See *Tuggle v. Netherland*, 516 U.S. 10, 13-15 (1995) (reversal of penalty based on invalid aggravating factor in non-weighing state).[2]

The Ninth Circuit also misread California law since the

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2. While this Court's plurality opinion in *Barclay v. Florida*, 463 U.S. 939, 954 (1983) refers to Florida's prohibition of non-statutory aggravating factors, it does not indicate that that limitation is essential to its definition of Florida as a weighing state.

sentencer is *not* "restricted to a "weighing' of aggravation against mitigation." (App. A at 9000). The word "weigh," by itself is simply a metaphor for a mental balancing process and under California law is synonymous with "consider, take into account, and be guided by . . ." *Brown*, 40 Cal.3d at 541; *People v. Frierson*, 25 Cal.3d 142 (1979).[3/] California juries may return a death sentence only if they believe it appropriate even if aggravation outweighs mitigation.

The Ninth Circuit's simplistic conclusion that California is a weighing state conflicts with this Court's jurisprudence on what makes a state statute weighing or non-weighing. California is a non-weighing state.

B. The Ninth Circuit's Holding Is Contrary To The California Supreme Court's View Of Its Own State Statute

One of the considerations in granting certiorari is whether the federal court of appeals has "decided an important federal question in a way that conflicts with a decision by a state court

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3. The ubiquitous "weighing" metaphor even appears in discussions of the "non-weighing" Georgia statute, such as when this Court addressed whether jurors would give an aggravating circumstance any "greater" or "special weight." *Zant*, 462 U.S. at 888, 890. Georgia's "non-weighing" statutory language directs the sentencer "to consider any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory circumstances *which may be supported by the evidence*. . ." *Zant*, 462 U.S. at 865. Similarly, California directs that "the trier of fact shall take into account any of the following factors if relevant. . ." and reiterates "After having heard and received all of the evidence, and after having heard and considered the arguments of counsel, the trier of fact shall consider, take into account and be guided by the aggravating and mitigating circumstances referred to in this section. . . ." Cal. Pen. Code, § 190.3. The terms "consider" and "take into account" and the decision whether something "outweighs" something else are virtually synonymous.

of last resort." U. S. Sup. Ct. Rule 10, subdivision (a). This case certainly meets that criterion. California has never viewed itself as a weighing state. Despite multiple opportunities to do so, the California Supreme Court has always instead focused on the aspects of the California death penalty statute that differentiate its capital sentencing scheme from that in a weighing state. See *Bacigalupo II*, 6 Cal.4th 457.

Following *Stringer*, this Court granted certiorari in *People v. Bacigalupo*, 1 Cal.4th 103 (1991) (*Bacigalupo I*), and remanded the case for further consideration in light of *Stringer*. *Bacigalupo v. California*, 506 U.S. 802 (1992). In its subsequent opinion, the California Supreme Court found that while the state scheme required juries to "weigh" aggravation and mitigation to reach a penalty determination, California is not a weighing state as described in *Stringer*. *Bacigalupo II*, 6 Cal.4th at 476. This Court denied certiorari. *Bacigalupo v. California*, 512 U.S. 1253 (1994).

The Ninth Circuit assumed in this case that the California Supreme Court's reliance, in Sanders' direct appeal, on *Zant*, which involved a non-weighing capital statute, instead of on the then-recent decision in *Clemons*, which involved a weighing capital statute, was inadvertent. (App. A 9003-9004) However, in light of the history and holdings in the *Bacigalupo* cases, it is clear that the California Supreme Court purposefully and correctly relied on *Zant* in delineating California's statute as a non-weighing statute and in assessing the impact of the invalid special circumstances on penalty selection in this case.

The California Supreme Court's citation to *Zant* in its opinion in this case and its continued reliance on *Zant* in subsequent cases when it clearly was aware of the *Clemons* and *Stringer* cases along with its citation to the *state law* standard for harmless error show the state supreme court has concluded California is a non-weighing state as a matter of Eighth Amendment law.

As this Court noted in *Stringer*, while relying on the Mississippi Supreme Court's view of its own death penalty law,

"It would be a strange rule of federalism that ignores the view of the highest court of a State as to the meaning of its own law. [Citation.]" *Stringer*, 503 U.S. at 235.

For the foregoing reasons, California's capital sentencing scheme more closely resembles the Georgia scheme identified by this Court in *Zant* as a non-weighing scheme. Thus, the Ninth Circuit's decision in *Sanders* stands in direct conflict with both United States Supreme Court authority and with California Supreme Court authority interpreting its own statute (*Bacigalupo II*). Certiorari should be granted.

II.

THE NINTH CIRCUIT'S DECISION IN *SANDERS* CREATED NEW RULES WHICH CANNOT BE APPLIED RETROACTIVELY

The Ninth Circuit has held that applying the harmless error rule for invalid aggravating factors in "weighing states" to California's statute was not a "new rule" under *Teague v. Lane*, 489 U.S. 288 (1989). *Beardslee v. Brown*, ___F.3d ___ (2004) (No. 01-99007, filed Dec. 29, 2004). In *Beardslee*, in which this same issue was raised, the Ninth Circuit explained that "If *Teague* precluded relief in this case [*Beardslee*], it necessarily would have precluded relief in *Sanders*, which it did not." Thus, the Ninth Circuit has acknowledged that it decided the *Teague* issue as a "threshold question." *Goeke v. Branch*, 514 U.S. 115, 117 (1995). It is now properly presented to this Court in this petition for writ of certiorari, and this Court has the discretion to consider the issue. See, e.g., *Hopkins v. Reeves*, 524 U.S. 88, 93, n.3 (1998); *Schiro v. Farley*, 510 U.S. 222, 227 (1994); *Godinez v. Moran*, 509 U.S. 389, 397, n.8 (1993).[4]

It was objectively reasonable for the California Supreme Court to conclude that a federal constitutional standard did not apply to invalid special circumstances in the penalty phase of Sanders' case. When the case became final, both *Zant*, applying to non-weighing states, and *Clemons*, applying to weighing states, had been decided. This Court did not address whether California's statute made it a weighing state or non-weighing state or yet a third type. After Sanders' direct appeal was final, this Court decided *Stringer*, reiterating and explicating

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4. The State did not raise *Teague* in the Ninth Circuit. However, the Ninth Circuit has now explicitly ruled on the issue. The issue is significant since it relates to the Ninth Circuit's definition of a "weighing" state and it has the potential to affect, at a minimum, 20 or more California capital cases in which the California Supreme Court has invalidated a special circumstance.

Clemons.

As already noted, the California Supreme Court decided *Bacigalupo II* in light of *Stringer*, and concluded that *Stringer* did not speak to California's different statutory scheme. *Bacigalupo II*, 6 Cal.4th at 476.

The Ninth Circuit determined that California is a weighing state because it did not permit the jury to consider non-statutory aggravating factors. Nothing in *Clemons* or *Stringer* supports, much less compels, that conclusion. Indeed, all of the weighing state cases have involved the jury's consideration of vague "propositional" aggravating factors requiring a yes or no answer. *See Tuilaepa*, 512 U.S. at 974-75. These statutes also had specific aggravating *and* mitigating factors. None of this Court's cases has involved a scheme such as California's, in which the penalty jury is not required to answer a specific question, but rather is merely directed to a subject matter. *Id.* at 975. If anything, the California scheme more closely resembles the Georgia statute in *Zant*, which did not require harmless error review because of an invalid aggravating factor.

Since it was objectively reasonable for the California Supreme Court to conclude that a federal constitutional standard did not apply when a special circumstance was declared invalid, the Ninth Circuit's pronouncement that the California statute was a weighing statute was a "new rule" of constitutional law.

III.

CALIFORNIA PERFORMS ITS OWN HARMLESS ERROR ANALYSIS TO INVALID SPECIAL CIRCUMSTANCES AND DID SO IN THIS CASE

The Ninth Circuit compounded its mistake in this case by holding that the California Supreme Court's harmless error analysis was inadequate. Contrary to this Court's precedents, the Ninth Circuit imposed a requirement of formulaic pronouncement by the state court that error is harmless. *Jones v. United States*, 527 U.S. 373, 403-404 (1999). The Ninth Circuit ignored California state law when it faulted the California court for not using the words "harmless error" or "reasonable doubt."

Long before *Stringer* and *Clemons*, the California Supreme Court applied its own *state law* "reasonable possibility" harmless error standard in evaluating the impact of one or more invalid special circumstances on the sentence selection process. *People v. Allen*, 42 Cal.3d 1222, 1281 (1986). The California "reasonable possibility" standard is identical to the *Chapman* standard. See *People v. Jones*, 29 Cal.4th 1229, 1264 n.11 (2003) ["Our state reasonable possibility standard is the same, in substance and effect, as the harmless beyond a reasonable doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24."]

After thoroughly reviewing the record, the California Supreme Court explicitly applied its *Chapman*-equivalent standard in this case. App. C, 67-68, citing *People v. Silva*, 45 Cal.3d 604, 632-636 (1988) and *Allen* (both of which explicitly invoked the "reasonable possibility" test). Thus, it should make no difference that the state high court did not make any ritualistic recitations.

CONCLUSION

For the foregoing reasons, Petitioner prays the petition for writ of certiorari be granted.

Dated: January 6, 2005

Respectfully submitted,

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